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September 2, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

**Re: Petition for Preemption of an Order of the South Dakota
Public Utilities Commission, CC Docket No. 96-45, DA 99-1356**

Comments of Western Wireless Corporation

Dear Ms. Salas:

On behalf of Western Wireless Corporation ("Western Wireless"), I am enclosing for filing an original and four copies of Western Wireless' Comments in the referenced proceeding.

If you have any questions regarding this matter, please contact me.

Respectfully submitted,



Ronnie London
Counsel for Western Wireless Corp.

Enclosures

cc: Attached Service List

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
WESTERN WIRELESS)	CC Docket No. 96-45
CORPORATION)	
)	
Petition for Preemption Of)	DA 99-1356
An Order Of The South Dakota)	
Public Utilities Commission)	

COMMENTS OF WESTERN WIRELESS

Western Wireless Corporation and its wholly-owned subsidiary, GCC License Corporation (collectively, "Western Wireless"), hereby file comments in response to the Commission's public notice 1/ regarding Western Wireless' Petition for Preemption of an order of the South Dakota Public Utilities Commission ("SDPUC") denying Western Wireless' request for designation as an eligible telecommunications carrier ("ETC") 2/ under Section 214(e) of the Communications Act of 1934, as amended ("Act"). 3/ Western Wireless files these Comments on its own petition to

1/ *Western Wireless Corporation Petitions for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, DA 99-1356 (released July 19, 1999).

2/ *Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, TC98-146 (released May 19, 1999) (attached as Appendix to the Petition for Preemption) ("*SDPUC Order*").

3/ 47 U.S.C. § 214(e).

discuss the effect of the recent decision in *Texas Office of Public Utility Counsel v. FCC* ^{4/} on Western Wireless' request for preemption of the *SDPUC Order*.

I. THE FIFTH CIRCUIT'S *TEXAS OPUC* DECISION DOES NOT AFFECT THE FCC'S OBLIGATION OR ABILITY TO PREEMPT THE *SDPUC ORDER*

In *Texas OPUC*, the Fifth Circuit reviewed the *Universal Service First Report and Order* and held, *inter alia*, that the FCC erred in determining that the plain language of Section 214(e)(2) of the Act precludes state commissions from imposing criteria for designating ETCs in addition to those specified by the FCC as required by the statute. ^{5/} The court held that “[n]othing in the statute . . . speaks at all to whether the FCC may prevent state commissions from imposing additional criteria on eligible carriers.” ^{6/}

The court did *not* hold, however, that the statute unambiguously allows states to impose whatever additional ETC criteria they want. Rather, the court simply held that the statute neither prohibits nor permits such state action, and that the FCC incorrectly concluded that the Act unambiguously bars the states

^{4/} ____ F.3d ____, 1999 WL 556461 (5th Cir. July 30, 1999) (“*Texas OPUC*”), *aff’g in part, rev’g in part, and remanding in part Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, First Report and Order, 12 FCC Rcd 8776 (1997) (“*Universal Service First Report and Order*”).

^{5/} *Texas OPUC* at *10-*11 (discussing *Universal Service First Report and Order*, 12 FCC Rcd at 8852, ¶ 145 (holding that “[t]he statute does not permit . . . a state commission to supplement the section 214(e)(1) criteria that govern a carrier’s eligibility to receive federal universal service support”)).

^{6/} *Id.* at *11.

from imposing additional criteria when designating ETCs. Indeed, the court specifically stated that it was not reaching the question of whether the FCC's jurisdiction would allow it to bar states from imposing such additional criteria. ^{7/}

The court did take pains to explain that some additional ETC criteria a state might attempt to impose could be unlawful. Specifically, the court stated:

To be sure, if a state commission imposed such onerous eligibility requirements that no otherwise eligible carrier could receive designation, that state commission would probably run afoul of § 214(e)(2)'s mandate to "designate" a carrier or "designate more than one carrier." ^{8/}

This recognition by the court raises certain implications. First, even though states may in the court's view impose additional ETC criteria, any criterion that is unduly "onerous" may run afoul of Section 214(e)(2). Second, if an additional criterion violates any other section of the Act, it, too, would be unenforceable. Moreover, the court never discusses in its decision the FCC's statutory power and obligation under Section 253 of the Act to preempt state rulings that constitute barriers to entry, and there can be no doubt that this power and obligation remain intact.

Western Wireless' Petition for Preemption demonstrates that the *SDPUC Order* is a barrier to entry in violation of Section 253. The Petition also shows that the *SDPUC Order* erroneously applies the requirements of Section 214(e)(1), that it imposes eligibility requirements so onerous as to prevent Western

^{7/} *Id.* at *10 ("we do not reach the states' jurisdictional challenges").

^{8/} *Id.* at *41 n.31.

Wireless (or any other carrier) from being designated as an ETC, and that it thwarts and impedes the Commission's policies regarding the *federal* universal service program. As such, *Texas OPUC* in no way precludes or affects the FCC's ability to grant the relief requested by the Petition for Preemption.

II. THE *SDPUC ORDER* MUST BE PREEMPTED AS VIOLATING THE ACT AND ERECTING A BARRIER TO ENTRY SO "ONEROUS" THAT NO NEW CARRIER COULD RECEIVE DESIGNATION AS AN ETC

A. The Commission Must Preempt the *SDPUC Order* as a Barrier to Entry Under Section 253 of the Act

As discussed above, the court's *Texas OPUC* decision does not diminish the Commission's mandate to preempt state rulings, such as the *SDPUC Order*, that stand as an effective barrier to entry. Western Wireless' Petition for Preemption demonstrates that the *SDPUC Order* serves as a barrier to entry by requiring ETC applicants to offer ubiquitous universal service before being designated, 9/ and by denying ETC status due to "gaps" in wireless carrier coverage areas. 10/ As explained in greater detail in our Petition for Preemption, these demands of the *SDPUC* serve as a barrier to entry because (i) they fly in the face of the economics of the telecommunications marketplace and the pro-competitive principles of the Act, and (ii) they make it impossible for non-incumbents to enter into markets supported by universal service subsidies and compete on a level playing field there with the

9/ Petition for Preemption at 11-16.

10/ *Id.* at 17-18.

incumbents. 11/ As such, the Commission must preempt the *SDPUC Order* notwithstanding the court's decision in *Texas OPUC*. 12/

B. The SDPUC's Timing Interpretation Violates Section 214(e) and is So "Onerous" as to Prevent New Carriers Receiving ETC Designation

The Petition for Preemption also demonstrates that the *SDPUC Order* violates Section 214(e) of the Act as well, by requiring a new entrant ETC applicant to be already providing ubiquitous universal service *before* receiving designation (and therefore *before* receiving universal service funding). This requirement effectively precludes new entrants from ever qualifying as ETCs, and thus violates the tenets underlying the new universal service system envisioned by the Act and the FCC, as well as the pro-competitive intent of the 1996 amendments to the Act. 13/ Indeed, the timing requirement is exactly the type of "onerous eligibility requirement" that would prevent "designat[ion of] more than one carrier" anticipated in note 31 of the court's decision in *Texas OPUC*. 14/

11/ *Supra*, notes 11-12.

12/ 47 U.S.C. § 253(d) ("If . . . the Commission determines that a State or local government has permitted or imposed any statute, regulation or legal requirement that violates subsection (a) or (b), *the Commission shall preempt* . . . such statute, regulation or legal requirement to the extent necessary to correct such violation or inconsistency.").

13/ See Petition for Preemption at 11-16 ("Congress simply did not intend ETC designation to be available only to the incumbent carriers, which would have the effect of maintaining a monopoly environment in rural America and depriving consumers there of the benefits of a competitive market.").

14/ *Texas OPUC* at *41 n.31; see Petition for Preemption at 11.

As the Petition for Preemption explains, “the SDPUC’s denial of ETC status *itself* makes it impossible for Western Wireless to provide the service that would enable it to qualify, in the SDPUC’s eyes, as an ETC.” 15/ Clearly this is what the court meant by a state commission “running afoul” of Section 214(e)(2)’s mandate to designate more than one carrier. As such, the Commission must preempt the *SDPUC Order*.

C. The *SDPUC Order* Thwarts and Impedes FCC Policy Objectives

In addition to leaving intact the Commission’s power to preempt state action pursuant to Section 253, the *Texas OPUC* court, by declining to address the jurisdictional question, also left unaffected the FCC’s general power to preempt state actions, such as the *SDPUC Order*, that thwart and impede federal communications laws and initiatives. The Petition for Preemption demonstrates that the SDPUC disregarded controlling FCC policies, thereby thwarting and impeding federal goals, with its rulings on (i) the timing of new entrant ETC designation and provision of ubiquitous universal service, 16/ (ii) the pricing of new entrant universal service offerings, 17/ and (iii) the amount of free local usage

15/ *Id.* at 12.

16/ *Id.* at 20-22 (*citing, inter alia, Universal Service First Report and Order*, 12 FCC Rcd at 8853, ¶ 137 (“a carrier must meet the section 214(e) criteria as a condition of its being designated as an [ETC] and *then* must provide the designated services . . .”) (emphasis in original)).

17/ *Id.* at 22-25 (*citing, inter alia, Universal Service Seventh Report and Order* at ¶ 72 (“We re-emphasize that the limitation on a state’s ability to regulate rates and

offered by ETCs. ^{18/} While these requirements imposed by the SDPUC are so onerous as to violate Section 214(e)(2), they also warrant preemption under traditional FCC preemption analyses grounded in the Supremacy Clause. ^{19/}

III. CONCLUSION

In sum, the Fifth Circuit's decision in *Texas OPUC* does not affect Western Wireless' request that the Commission preempt the *SDPUC Order*. The court did not address the Commission's power and duty to preempt pursuant to Section 253 of the Act, nor its ability as a federal agency to preempt contradictory state regulation of matters arising under the Act. If anything, *Texas OPUC* provides another basis supporting preemption, *i.e.*, that the rulings contained in the *SDPUC Order* impose "such onerous eligibility requirements that no otherwise eligible carrier could receive designation" from the SDPUC. For all the reasons set forth in Western Wireless' Petition for Preemption and herein, the Commission

entry by wireless service carriers [under 47 U.S.C. § 332(c)(3) does not allow the states to deny wireless carriers ETC status.").

^{18/} *Id.* at 25 (citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 21252 (1998); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Further Notice of Proposed Rulemaking, 12 FCC Rcd. 18514 (1997) (both seeking comment on amount of minimum local usage, if any, Commission should require of ETCs)).

^{19/} *See id.* at 22 (citing *Illinois Pub. Telecoms. Ass'n v. FCC*, 117 F.3d 555, 561 (D.C. Cir. 1997); *Louisiana PSC v. FCC*, 476 U.S. 355, 369 (1986); *AT&T v. Iowa Util. Bd.*, 119 S.Ct. 721 (1999)).

should grant Western Wireless the relief sought in its Petition for Preemption of the
SDPUC Order.

Respectfully submitted,

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